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In The
Supreme Court of the United States
October Term, 1983

ATHENS LUMBER COMPANY, INCORPORATED,
AND
JOHN P. BONDURANT,

Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

On Appeal from
The United States Court of Appeals
For the Eleventh Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the ban on corporate political expenditures in federal elections of 2 U.S.C. § 441b(a) violates the First Amendment because it (a) deprives voters of their right to hear all points of view concerning the qualifications of candidates based solely on the corporate source of the information, (b) prohibits corporate expenditures for the publication of information concerning candidates for President or Congress without regard to the truthfulness or relevancy of the information, and (c) discriminates by prohibiting political speech by appellants and other non-media corporations while permitting media corporations, partnerships, other organized groups, and individuals to make unlimited expenditures for political advocacy.

2. Whether the ban on political contributions by corporations to candidates for President or Congress, regardless of amount, imposed by 2 U.S.C. § 441b(a) is overbroad and discriminatory in view of the fact that Congress has expressly authorized partnerships, other business and non-business organizations, and individuals to contribute $1,000 per year to such candidates.

3. Whether 2 U.S.C. § 441b(a) which prohibits contributions and expenditures by corporations if made "in connection with" federal elections is unconstitutionally vague under the First and Fifth Amendments.

4. Whether Athens Lumber Company has standing to join its president and shareholder, who is also a qualified voter, in challenging the constitutionality of 2 U.S.C. § 441b(a) under the expedited review provisions of 2 U.S.C. § 437h.

INTERESTED PARTIES

Pursuant to Supreme Court Rule 15.1(b), the following list identifies all parties to this case:

Athens Lumber Company, Incorporated

John P. Bondurant

Federal Election Commission

William French Smith, in his official capacity as Attorney General of the United States

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Eleventh Circuit opinions from which this appeal is taken, *Athens Lumber Co. v. Federal Election Commission*, 718 F.2d 363 (11th Cir. 1983) (*en banc*), and *Athens Lumber Co. v. Federal Election Commission*, 689 F.2d 1006 (11th Cir. 1982), are reproduced as Appendices A and B, respectively. The opinion of the district court is re-

ported as *Athens Lumber Co., Inc. v. Federal Election Commission*, 531 F. Supp. 756 (M.D. Ga. 1982), and is reproduced in Appendix C.

JURISDICTION

This is a declaratory judgment action brought by a qualified voter and a corporation under the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 437h(a), to construe the constitutionality of 2 U.S.C. § 441b(a) prohibiting corporate contributions or expenditures "in connection with" federal elections.

On October 24, 1983, the Eleventh Circuit Court of Appeals *en banc* entered a final judgment upholding the constitutionality of § 441b(a). The final judgment below is reproduced as Appendix D.

A timely notice of appeal was filed by the appellants from the decision below in the United States Court of Appeals for the Eleventh Circuit on October 28, 1983. The notice of appeal is reproduced as Appendix E.

Jurisdiction to review this decision of the United States Court of Appeals for the Eleventh Circuit by direct appeal is conferred upon this Court by 2 U.S.C. § 437h(b). *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Buckley v. Valeo*, 424 U.S. 1, 6-12 (1976).

In the alternative, this Court has jurisdiction to review the decision below by writ of certiorari under 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The challenged Federal Election Campaign Act provision, 2 U.S.C. § 441b(a), provides:

> "(a) It is unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices or for any candidate, political committee, . . . or any officer or any director of any corporation or of any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section."

STATEMENT OF THE CASE

John Bondurant, in his capacity as a registered voter and as president of Athens Lumber Company, and the corporation brought a declaratory judgment action under the expedited review provisions of the Federal Election Campaign Act (2 U.S.C. § 437h) challenging the constitu-

tionality of the ban on corporate political "expenditures" and "contributions" in connection with federal elections. 2 U.S.C. § 441b(a). The complaint alleged that the statute was invalid under the First Amendment on eight specific grounds and sought to enjoin its enforcement against proposed "expenditures" and "contributions" of corporate funds of Athens Lumber Company authorized by a unanimous resolution of its shareholders.

Athens Lumber Company is a small closely-held Georgia corporation engaged in the manufacture and sale of architectural millwork, lumber and building materials in Athens, Georgia. All of the stock in the Company is owned by John Bondurant and five members of his immediate family. Mr. Bondurant is the president and chief executive officer of the corporation, and is also a registered voter duly qualified to vote in federal elections.

On July 23, 1981, the stockholders of Athens Lumber Company *unanimously* adopted a shareholders' resolution reproduced in Appendix F. The resolution cited the pervasive influence of the federal government over the economy in general, and the housing market in particular, and the effects of federal economic and other policies on the Company's business, customers and suppliers. The resolution authorized the expenditure of $10,000 in corporate funds in connection with federal elections held prior to December 31, 1984.

The shareholders voted to require that at least half of the fund be used for independent political "expenditures" (*i.e.*, newspaper, radio or television advertisements, bill inserts to customers or mailings to suppliers) advocating the election or defeat of specific candidates for

federal office. The shareholders voted to use the remainder of the fund for "contributions" of not more than $100 each in the name of the corporation, directly to candidates for federal offices, whose positions on economic issues the corporation favored.

These proposed "expenditures" of corporate funds for independent political advertising, and the "contribution" of corporate funds to candidates for federal offices, would, as the resolution acknowledged, violate the Federal Election Campaign Act, 2 U.S.C. § 441b(a), and could expose the corporation, Mr. Bondurant, and other consenting directors to severe civil and criminal penalties. 2 U.S.C. § 437g. The shareholders directed that a declaratory judgment be filed by Athens Lumber Company and its president under the expedited review provision of the Federal Election Campaign Act to determine the validity of the Act as applied to the corporation's proposed political activities. 2 U.S.C. § 437h.

The district court refused to certify the constitutional issues to the court of appeals as required by 2 U.S.C. § 437h(b), and dismissed the complaint on the ground that both the corporation and Mr. Bondurant lacked standing under Article III. *Athens Lumber Company v. FEC*, 531 F. Supp. 756 (M.D. Ga. 1982).

This decision was reversed by a panel of the Eleventh Circuit as to Mr. Bondurant (but not as to the Company), which certified eight constitutional issues to the full Elev-

enth Circuit for expedited *en banc* review as required by 2 U.S.C. § 437h(b).[1]

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[1] The constitutional issues certified were as follows:

The "Expenditures" Issues

(1) Whether 2 U.S.C. § 441b(a) violates the First Amendment because it prohibits the expenditure of corporate funds to publish or communicate to the electorate truthful statements concerning the qualifications of specifically named candidates for election to federal offices.

(2) Whether 2 U.S.C. § 441b(a) is invalid under the First Amendment because it deprives the individual plaintiff, as a qualified voter, of his right to hear all points of view regarding the qualifications of candidates for federal office, including the views of corporations, national banks and labor unions.

(3) Whether 2 U.S.C. § 441b(a) violates the First Amendment because it prohibits the plaintiffs from spending corporate funds, independent of the campaign of any candidate and regardless of amount, for newspaper, radio or television advertising to advocate the election or defeat of a specifically identified candidate for federal office.

(4) Whether 2 U.S.C. § 441b(a) violates the First Amendment because it prohibits the plaintiffs from spending corporate funds, independent of the campaign of any candidate and regardless of amount, to distribute letters advocating the election or defeat of specifically identified candidates for federal office to be included as inserts in the monthly bills mailed by the corporate plaintiff to its customers and suppliers, or in other mailings made at the expense of the corporate plaintiff.

The "Contributions" Issue

(5) Whether 2 U.S.C. § 441b(a) violates the First Amendment because it prohibits the plaintiffs from making any direct political *contributions* from corporate funds of the Athens Lumber Company, Incorporated, to candidates for federal office.

The Discrimination - Overbreadth Issues

(6) Whether the provisions of 2 U.S.C. § 441b(a), together with the provisions of 2 U.S.C. § 431(9)(B)(i), discriminate ar-

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On October 24, 1983, the full Eleventh Circuit adopted the ruling of the panel on the issue of standing, but in a single sentence held that the eight constitutional issues raised by the appellants were "controlled by the [Su-

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bitrarily and unreasonably in violation of the First and Fifth Amendments between corporations engaged in businesses other than publication of newspapers and magazines, on the one hand, and corporations engaged in the publication of newspapers and magazines, on the other hand, by prohibiting corporations in the former category from making any contributions or expenditures in connection with any elections to federal office, while expressly permitting corporations that publish newspapers and magazines to make "expenditures" of corporate funds to endorse, publicize the views of, and advocate the election and defeat of specifically identified candidates for public office.

(7) Whether the provisions of 2 U.S.C. § 441b(a) discriminate arbitrarily and unreasonably in violation of the First and Fifth Amendments between corporations, labor unions, and national banks, on the one hand, and natural persons and other organizations, on the other, by:

(a) Absolutely prohibiting the plaintiff corporation from making a contribution of money, in any amount, directly to a candidate for federal office or their campaign, while permitting natural persons and other organizations to give up to $1,000 directly to candidates for federal office or to their campaigns; and

(b) Absolutely prohibiting the plaintiff corporation from spending corporate funds, in any amount, independent of the campaign of a candidate for federal office, while permitting natural persons and other organizations to spend unlimited amounts to promote the election or defeat of specifically identified candidates.

Vagueness

(8) Whether the provisions of 2 U.S.C. § 441b(a), which threaten criminal sanctions for contributions or expenditures by the plaintiff corporation "in connection with" federal elections, are unconstitutionally *vague* under the First and Fifth Amendments.

preme] Court's unanimous opinion in *Federal Election Commission v. National Right to Work Committee, et al.*, — U.S. —, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982), and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional." 718 F.2d at 363.

———o———

THE QUESTIONS ARE SUBSTANTIAL

I.

The Constitutionality of the Ban on Corporate Expenditures and Contributions Has Never Been Ruled Upon by this Court

This Court has never directly ruled upon the constitutionality of the ban on corporate "expenditures" and "contributions" in federal elections, which has been aptly described by Justice Rutledge as "a bludgeon ill-designed for curbing the evils said to justify its enactment . . . ." *United States v. C.I.O.*, 335 U.S. 106, 153 (1948) (concurring opinion).

The ban on corporate political "contributions" was enacted in the Tillman Act of 1907, and was amended several times before being incorporated as a part of the Federal Corrupt Practices Act in 1925.

The legislative history of the Tillman and Federal Corrupt Practices Acts reflects no awareness on the part of Congress of the relevance of the First Amendment to prohibitions of corporation political activity. This is not surprising, since these enactments not only predate the

Court's recent concern with First Amendment rights of corporations, but also predate all of this Court's cases invalidating legislation under the First Amendment. *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931). In 1947, the Taft-Hartley Act added the ban on "expenditures" by corporations, and also extended the ban to unions. In 1976, the prohibitions on corporate and union political contributions and expenditures in federal elections were transferred from 18 U.S.C. § 610 of the criminal code to the Federal Election Campaign Act. 2 U.S.C. § 441b(a).

The legislative history of the Federal Corrupt Practices Act has been described by Justice Rutledge as "a veritable fog of contradictions . . . ." *United States v. C.I.O.*, 335 U.S. 106, 134 (1948) (concurring opinion). Serious doubts as to the constitutionality of these sweeping restrictions on corporate and union political activity have been expressed for more than 30 years. In 1947, President Truman vetoed the Taft-Hartley Act in part, because of his conviction that the extension of the Federal Corrupt Practices Act to unions violated the First Amendment. H.R. Doc. No. 334, 80th Cong. 1st Sess. 9; *United States v. C.I.O., supra*, at 138-39 (concurring opinion).

In 1948, the Federal Corrupt Practices Act narrowly escaped condemnation in *United States v. C.I.O., supra*. Four Justices of the Court expressed "the gravest doubt . . . as to [the Act's] constitutionality," but were able to avoid "the dangers of unconstitutionality" by a tortured construction of the Act which enabled them to affirm the dismissal of an indictment against the CIO without reaching the First Amendment issues. Four other Justices of the Court declared the Act "patently invalid" under the

First Amendment in a textbook opinion by Justice Rutledge joined by Justices Black, Douglas and Murphy. Justice Frankfurter's swing vote cited the *government's* concessions in the trial court that the Act "is an abridgment of 'rights guaranteed by the First Amendment'" (335 U.S. at 127) as a reason for refusing to decide the constitutionality of the Act. *See also United States v. UAW-CIO*, 352 U.S. 567, 593-98 (1957) (dissenting opinion of Justice Douglas in which Chief Justice Warren and Justice Black joined).

Recent decisions of this Court have reinforced the conviction that the FECA's sweeping ban of both "expenditures" and "contributions" by corporations "in connection with" federal elections violate the First Amendment. *Buckley v. Valeo, supra; First National Bank of Boston v. Bellotti, supra; Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530 (1980); *Citizens Against Rent Control v. City of Berkeley, supra.* This conclusion has been confirmed by Justice White, who has observed that the combined effect of *Buckley* and *Bellotti* has been merely "to reserve formal the interment of the Corrupt Practices Act [now 2 U.S.C. § 441b(a)] . . . for another day. . . ." *First National Bank of Boston v. Bellotti, supra,* at 821 (dissenting opinion).

II.

The Statute Deprives the Electorate of Potentially Relevant Political Information from Corporate Sources

America's corporations are deep and diverse reservoirs of information on a wide range of economic and other topics that are relevant to voters in selecting their elected representatives. The statute excludes corporations from political debate. Its "object was . . . to force [corporations and] unions . . . entirely out of political

life and activity, . . . concerning matters affecting their vital interests at the most critical point where the expression would become effective." *United States v. C.I.O.*, *supra*, at 150 (concurring opinion).

The Act rests on the premise that the government has the constitutional right to "protect" the electorate by suppressing information from corporate sources that might unduly influence their decisions as voters. "'[U]ndue influence' in this connection may represent no more than convincing weight of argument fully presented . . . the very thing the Amendment and the electoral process . . . were intended to bring out." *United States v. C.I.O.*, 335 U.S. 106, 145 (concurring opinion).

The statute limits the information available to voters about the platforms and policies of candidates for President or Congress primarily to that provided by candidates, political parties and the press. "[T]he press does not," as Justice Powell observed in *Bellotti*, "have a monopoly on either the First Amendment or the ability to enlighten" voters concerning campaign issues. 435 U.S. at 782.

In *C.I.O.*, the four concurring Justices protested the "ostrichlike conception" of the Act which "deprives the electorate, the persons entitled to hear, . . . of the advantage of free and full discussion . . ." by corporations and unions of the qualifications of candidates for President and Congress. 335 U.S. 144. "To say that labor unions [and corporations] . . . have nothing of value to contribute to that process . . . is to ignore the obvious facts of political and economic life." *Id.*

This Court has repeatedly stressed that "in applying the First Amendment . . . we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech much less political

speech in the belief that '[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them . . .'" *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980). *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *First National Bank of Boston v. Bellotti*, *supra*, at 790-91; *United States v. UAW-CIO*, *supra*, at 593 (dissenting opinion).

The First Amendment "remove[s] 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us in the hope that the use of such freedom will ultimately produce a more capable category and more perfect polity. . . .'" *Consolidated Edison*, *supra*, at 524.

The Act thus conflicts with the First Amendment's "informational purpose" which, as the Court explained in *Bellotti*, "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public [and especially voters] may draw." 435 U.S. at 783.

III.

The Issues Are Not Controlled by National Right To Work Committee

The lower court did not make an independent assessment of the First Amendment issues certified by the panel nor did it give the statute the "exacting scrutiny" which decisions of this Court require in First Amendment cases. Rather, the lower court ruled that it was foreclosed from

making a careful inquiry by this Court's ruling in *FEC v. National Right to Work Committee, supra,* — U.S. —, 74 L.Ed.2d 364 (1982).

National Right to Work Committee involved different issues and is not controlling. *NRWC* involved two issues: (1) whether contributors to NRWC's political action committee were "members" of the Committee, and, if they were not, (2) were the provisions of 2 U.S.C. § 441b(b) (4) (C), which prohibited nonprofit corporations from soliciting contributions from non-members violative of the non-members' "associational interests" under the First Amendment. The Court's negative responses to these issues did not address, much less foreclose, the First Amendment issues raised by the appellants.[2]

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[2] The opinion in *NRWC* was authored by Justice Rehnquist, whose views on the First Amendment are not always in accordance with the views of the majority on First Amendment issues over the last 50 years. Thus, in his dissenting opinion in *Bellotti,* Justice Rehnquist argued that the First Amendment has only "limited application . . . to the States," 435 U.S. at 823, and would apparently overrule *Grosjean v. American Press Co.,* 297 U.S. 233 (1936). 435 U.S. at 823. He also dissented in all of this Court's recent decisions recognizing the First Amendment rights of corporations, including *Bellotti, supra; Citizens Against Rent Control v. Berkeley,* 454 U.S. 290 (1981); *Consolidated Edison Co., supra;* and *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980). In *NRWC,* Justice Rehnquist, in *dictum,* cited cases from outside the First Amendment area involving economic regulation of interstate commerce to support the assertion that corporations have "special characteristics" that require that the Court "accept Congress's judgment . . . [and not] second guess a legislative determination as to the need for prophylactic measures. . . ." 74 L.Ed.2d at 377. This *dictum* is in direct conflict with the many First Amendment cases in which this Court has refused to defer to legislative judgments where First Amendment rights have been infringed, and has subjected statutes infringing First Amendment rights to "exacting scrutiny" and required that the legislature bear the "heavy burden" of demonstrating the constitutionality of the restraints and that the statutes are "narrowly drawn." *See, e.g., Elrod v. Burns,* 427 U.S. 347, 362-63

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A three-judge district court has recently rejected a claim by the FEC that *NRWC* controlled as to the constitutionality of the $1,000 ceiling which Congress imposed in the Presidential Election Campaign Fund Act on the amount that PAC's are allowed to spend in support of the election of a candidate for President who is receiving federal campaign funds. *Democratic Party of the United States v. National Conservative Political Action Committee*, — F. Supp. — (E.D. Pa., Dec. 12, 1983) (*see* 52 U.S.L.W. 2369 (Jan. 10, 1984)). Judge Becker said:

> "We reject the proposition that NRWC and CMA undermine our conclusion that section 9012(f) stifles political debate protected by the First Amendment. . . .
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> • • •
>
> "In sum, we do not read NRWC as overruling Buckley or as disturbing the result we reach here. Accordingly, we remain firm in our belief that, as a matter of law [citation], the expenditures barred by section 9012(f) are fully protected speech."

IV.

The Statute Is Unconstitutional Under the First Amendment and Prior Decisions of this Court

Specific portions of § 441b(a) are plainly unconstitutional under previous decisions of this Court.

A.

The Ban on Expenditures

In *Buckley v. Valeo, supra,* this Court held that the $1,000 ceiling imposed by the FECA on independent politi-

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(1976); *Central Hudson Gas & Electric Corp. v. Public Service Commission, supra,* at 561-66; *Bellotti, supra,* at 786. Nor does it make any difference that Congress made the determination under consideration. *See United States v. Grace,* — U.S. —, 75 L.Ed.2d 736 (1983).

cal expenditures in candidate elections invalid under the First Amendment:

> "Second, quite apart from the shortcomings of § 608(e) (1) in preventing any abuses generated by large independent expenditures, *the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption* comparable to those identified with large campaign contributions. . . . Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive.
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> • • •
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> "While *the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,* it heavily burdens core First Amendment expression. For the First Amendment right to '"speak one's mind . . . on all public institutions"' includes the right to engage in '" vigorous advocacy" no less than "abstract discussion."' *New York Times Co. v. Sullivan*, ... Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." 424 U.S. at 45-48 (emphasis supplied) (citations omitted).

Because the Act imposes not a ceiling, but a *total ban* on independent "expenditures" of corporate funds to influence the vote in federal elections, it is invalid under *Buckley*. *See United States v. C.I.O.*, *supra*, at 146 (the Act prohibits expenditures of " 'a dollar, or 50 cents, or $500 or $1,000' ").

The ban on expenditures is also invalid because it indiscriminately prohibits corporations from publishing

truthful information about a candidate for President or Congress.[3]

Even *false* statements about candidates for public office are entitled to a measure of First Amendment protection. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Brown v. Hartlage*, 456 U.S. 45, 60-62 (1982) (holding invalid Kentucky Corrupt Practices Act that prohibited false campaign promises). A *fortiori*, the government has no power to prohibit corporations, unions, or anyone else from publishing *truthful* information to the electorate about a candidate for public office. *Consolidated Edison Co. v. Public Service Commission*, *supra*, at 534 ("[T]he First Amendment 'embraces at the least the liberty to discuss publicly and *truthfully* all matters of public concern', *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940)."). *Central Hudson*, *supra*, at 562 ("Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all").

No governmental interest can be conceived that would justify the punishment of a corporation for using corpo-

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[3] The dangers are not imaginary. Small corporations have been indicted for using corporate funds with unanimous shareholder approval to publish a list of Congressmen whose voting record indicated belief in "our free enterprise system, our constitutional government and freedom under God." *See United States v. Lewis Foods Co.*, 236 F. Supp. 849, 851 (S.D. Cal. 1964), *rev'd*, 366 F.2d 710 (9th Cir. 1966). The FEC also sued a small corporation for spending $135 in corporate funds to publish and mail a list of "Big Spenders" in Congress. *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980).

rate funds to publish something that is true about the President or a Congressman. Indeed, this Court has struck down overly-broad statutes because they restricted truthful information about candidates, *Mills v. Alabama*, 384 U.S. 214 (1966) (election day political appeals), or even the dissemination of truthful commercial information. *See, e. g., Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977) (ordinance restricting "For Sale" signs held invalid because "*in any event* the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information" (emphasis supplied)); *Central Hudson Gas & Electric Corp. v. Public Service Commission, supra; Consolidated Edison Co. v. Public Service Commission, supra*, at 534.

The Act's ban on corporate political expenditures also collides head-on with the decisions of this Court holding invalid source restrictions,[4] and content-based restrictions on First Amendment rights.[5]

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[4] For example, an ad endorsing Ronald Reagan or Walter Mondale for President is legal if published by an individual or a partnership, but is unlawful if the same ad is published at corporate or union expense. *See, e.g., Consolidated Edison Co. v. Public Service Commission, supra*, at 533 ("The restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech"); *First National Bank of Boston v. Bellotti, supra*, at 784-85.

[5] For example, a corporation is free to lobby and advocate a corporate point of view on an abstract issue, but if an advertisement mentions a specifically identifiable candidate, the corporation is liable to penalties under the Act. *See United States v. Lewis Food Co., supra; FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980). Content-based restrictions are a form of censorship and are *per se* unlawful under the First Amendment. *See, e.g., Consol-*

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The ban is both over-inclusive and under-inclusive. Most of the corporations covered by the ban are small businesses that present no threat of undue influence or corruption. Of the 2.5 million corporations in the United States subject to the ban, over 1.4 million (56%) have total assets of less than $100,000, while 92% (2.3 million) have assets of less than $1,000,000. U.S. Bureau of Census, *Statistical Abstract of the United States,* 1982-83 p. 536 (Table 899) (103d ed.). Assuming for the sake of argument that large corporations such as General Motors or Exxon may have sufficient resources to exert an "undue influence" on the political process, there is no reason to ban Athens Lumber Company and the 1.4 million other small corporations from making independent expenditures to express their views concerning the election of candidates for Congress because of the candidates' stands for or against legislation affecting their particular businesses.

The ban is also under-inclusive. As this Court has already recognized. "Some of the most powerful private institutions in the Nation" conduct business in "partnership form. Wall Street law firms and stock brokerage firms provide significant examples." *Bellis v. United States,* 417 U.S. 85, 93 (1974). The Big Eight accounting firms are also partnerships and have annual revenues approaching $1 billion,[6] far exceeding those of Athens Lum-

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idated Edison Co. v. Public Service Commission, supra, at 537-38 ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth"); *First National Bank of Boston v. Bellotti, supra,* at 791-92 (n.31); *Police Department of City of Chicago v. Mosley,* 408 U.S. 92 (1972).

[6] The Year of the Accountant, *N.Y. Times* Jan. 3, 1982.

ber Company and most corporations covered by § 441b (a). Yet partnerships, trusts and other unincorporated business and non-business organizations are exempt from § 441b(a) and are free to make unlimited "expenditures" for political advocacy, *Buckley v. Valeo, supra,* and to make contributions of up to $1,000 to a candidate for federal office.

The ban on corporate political expenditures "give[s] the institutionalized political parties an almost impervious monopoly over the agenda and terms of debate in [not only] presidential [but all federal] electoral campaigns. Were we to give our blessing to the law . . . we would be permitting only those few with control over our major political parties, our institutionalized press or with vast individual resources . . . to be heard above the din of everyday existence. Where the threat of corruption is so minimal, we cannot so abnegate our responsibilities." *Democratic Party of the United States v. National Conservative Political Action Committee, supra.*

B.

The Ban on Contributions

There are also good reasons to conclude that the Act's total ban on political contributions by corporations constitutes both an overly-broad and discriminatory infringement on First Amendment rights.

The ban rests on the unsupported premise that there is a connection between the manner in which a business is organized (*i. e.*, the act of incorporation) and the likelihood of corruption of public officials by contributions from corporate sources. Incorporation is at most a neutral fact. Corporations are no better and no worse than in-

dividuals or other organizations. A $100 contribution from Athens Lumber Company to a candidate for President is no more likely to corrupt Ronald Reagan or John Glenn than a $100 contribution from a wealthy individual, or a large law firm or accounting firm. The ban discriminates arbitrarily against corporations which are prohibited from giving even a penny to a candidate for federal office. A convicted narcotics peddler, on the other hand, is permitted to give $1,000 to each of the members of the Senate Select Committee on Racketeering. Such "exceptions to the general prohibition are of great significance in assessing the strength of the [governmental] interest . . ." served by the statute. *Metromedia, Inc. v. San Diego*, 435 U.S. 490, 520 (1981).

In *Buckley*, the Court recognized that the right to make a political contribution directly to a candidate is a First Amendment right. The Court emphasized that the "First Amendment protects political association as well as political expression" [424 U.S. at p. 15], and that "[a] contribution serves as a general expression of support for the candidate" [*id.* p. 21], and that "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate." 424 U.S. at 22. The Court found, however, that these First Amendment rights were not significantly infringed by the $1,000 contribution ceiling because § 608(b) expressly preserved the donor's right to affiliate with and express his support of a candidate by making *a significant contribution* of up to $1,000 to the candidate's campaign. 424 U.S. at 24-29.

The Court held that the $1,000 ceiling was narrowly drawn and no broader than necessary because it specifically addressed the danger area and did not invade First

Amendment rights of smaller contributors whose contributions carried no significant potential for corruption:

> "The Act's $1,000 contribution limitation *focuses precisely on the problem of large campaign contributions*—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to . . . assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. . . .
>
> "We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling."
>
> 424 U.S. at 28-29 (emphasis supplied).

In view of the determination by Congress that contributions of up to $1,000 per candidate for individuals and other organized groups are not likely to corrupt or "secure a political *quid pro quo* from current office holders . . .," the total ban on all political contributions by corporations is overly broad under the First Amendment.

C.

Vagueness

This Court has emphasized that "'stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech.'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (Burger, C.J.).

Vagueness was one of many defects on which the four Justices would have invalidated the Federal Corrupt Practices Act in *United States v. C.I.O.* As Justice Rutledge explained:

"It is difficult to conceive a statute affecting [First Amendment] rights more lacking in precision, more broad in the scope of doubt and uncertainty of its reach.

"We have only the broad and indefinite words 'expenditure in connection with any election.' Apart from the literal sweep of 'expenditure' and the large area of doubt created by efforts to confine it, what is 'in connection with'? What is a forbidden because a political comment? What sorts of union activities outside of publishing a newspaper with unsegregated funds would fall under the ban?"

335 U.S. at 151 (concurring opinion).[7]

"To the gambles of the statute itself are added those of guessing not only at its perimeter but at its very center. . . .

"Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long-established constitutional principles surrounding their delimitation. They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage."

335 U.S. at 153 (concurring opinion).

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[7] In a footnote, Justice Rutledge elaborated on the ambiguity of the statute:

"When does the connection begin? Obviously not with the date of the election, primary, convention or caucus. How long beforehand, with the announcement of candidacies or with earlier though not always public efforts to induce persons to run? When does the connection end? With the selection of candidates in the one case and the election of officers in the other or does it extend to activities relating to these events taking place later?"

335 U.S. at 151 (n.28).

In *Buckley v. Valeo*, the Supreme Court found that § 608(e) (1) of the FECA that prohibited expenditures "in relation to" an election of candidates for federal office, was, *standing alone*, unconstitutionally vague. The Court salvaged the vague language by incorporating limitations contained in another subsection of the same Act:

> *"The constitutional deficiencies* . . . can be avoided only by reading § 608(e) (1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of 'clearly identified' in § 608(e) (2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication. . . . *We agree that in order to preserve the provision against invalidation on vagueness grounds*, § 608(e) (1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."

424 U.S. at 43-44 (emphasis supplied).

There is no similar clarifying statute available to eliminate the vagueness of the "in connection with" language of § 441b(a). *Buckley*, therefore, reinforces Justice Rutledge's conclusion in *C.I.O.* that § 441b(a) is unconstitutionally vague.

This conclusion is further supported by the Court's alternative holding in *Bellotti*. In *Bellotti*, the Court ruled that, even if Massachusetts' prohibition on corporate political contributions and expenditures had been otherwise "unobjectionable," the statute was unconstitutionally vague. Justice Powell explained in footnote 21 of the majority opinion that:

> "Even assuming that the rationale behind the 'materially affecting' requirement itself were unob-

> jectionable, *the limitation in § 8 would have an impermissibly restraining effect on protected speech.* Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in § 8. . . . As the facts in this case illustrate, management never could be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue. In addition, the burden and expense of litigating the issue—especially when what must be established is a complex and amorphous economic relationship—would unduly impinge on the exercise of the constitutional right. '[T]he free dissemination of ideas [might] be the loser.'"

435 U.S. at 785 (n.21) (emphasis supplied) (citations omitted).

Section 441b(a) violates the stricter standards of vagueness that apply in First Amendment cases and is, therefore, invalid.

CONCLUSION

Judge Irving Kaufman has highlighted the "disturbing legacy of the Federal Election Campaign Act." *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F. 2d 45, 53 (2d Cir. 1980). He condemned the Federal Election Commission for its "insensitivity to First Amendment values" and for having "failed abysmally to meet [its] awesome responsibilities." He warned of the danger of creating a federal agency as a watchdog over federal elections:

> "Officials can misuse even the most benign regulation of political expression to harass those who oppose them . . . thereby depriving citizens of valuable opin-

> ions and information. This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled or sterilized."
>
> 616 F. 2d at 54-55.

Judge Kaufman found the Federal Election Campaign Act "disturbing because citizens of this nation should not be required to account to [the FEC or] this court for engaging in debate of political issues. . . . Moreover, it is incongruous to compel [an organization] to convince a court that they have not dared to 'expressly advocate' the defeat of a candidate for public office. I had always believed that such advocacy was to be applauded in a representative democracy." *Id.*, at p. 54.

The constitutionality of the prohibition of corporate political expenditures and contributions has been widely debated for over 50 years. The issue should be squarely addressed and resolved.

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APPENDIX A

ATHENS LUMBER COMPANY, INCORPORATED,
John P. Bondurant,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION and William F. Smith, in his official capacity as Attorney General of the United States,

Defendants-Appellees.

No. 82-8102.

United States Court of Appeals,
Eleventh Circuit.

Oct. 24, 1983.

Appeal from the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT and CLARK, Circuit Judges.*

PER CURIAM:

This case was taken en banc by vote of the judges of this court pursuant to Rule 35 Fed. R. App. P. and not under 2 U. S. C. § 437h.

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*Judge Anderson is recused and did not participate in this decision.

Standing as found by the panel opinion in *Athens Lumber Company, Inc. v. Federal Election Commission*, 689 F. 2d 1006 (11th Cir. 1982) now vacated, is found by this en banc court for the reasons given in the panel opinion.

Viewing the substantive constitutional issues as being controlled by the Court's unanimous opinion in *Federal Election Commission v. National Right to Work Committee et al.*, — U. S. —, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982), and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional.

The judgment of the district court 531 F. Supp. 756 dismissing the case is REVERSED. The case is REMANDED for entry of judgment for defendant.

APPENDIX B

ATHENS LUMBER COMPANY, INCORPORATED, John P. Bondurant,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION and William F. Smith, in his official capacity as Attorney General of the United States,

Defendants-Appellees.

No. 82-8102

United States Court of Appeals,
Eleventh Circuit.
Oct. 22, 1982.

Appeal from the United States District Court for the Middle District of Georgia.

Before HILL and CLARK, Circuit Judges, and SCOTT*, District Judge.

JAMES C. HILL, Circuit Judge:

Appellant Athens Lumber Co. and its President, John P. Bondurant, challenge the constitutionality of a 2 U. S. C. § 441b(a)[1] of the Federal Election Campaign Act (FECA)

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*Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

1. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election

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insofar as it prohibits a corporation from making direct political contributions and expenditures in a federal election. They ask that we certify the issues raised by their complaint to the United States Court of Appeals for the Eleventh Circuit en banc pursuant to the expedited procedures provided in 2 U. S. C. § 437h. The district court, 531 F. Supp. 756, refused such certification and dismissed appellants' claim for want of Article III jurisdiction. We reverse, and find that both Athens and Bondurant have presented justiciable claims. We hold further that, although Athens is not a proper plaintiff to invoke section 437h expedited review, Bondurant is a proper plaintiff, and also has standing to raise, vicariously, those issues relating to Athens. Thus, we certify certain constitutional challenges raised by appellants to the court of appeals en banc.

I

Athens Lumber Co. ("Athens") is a Georgia corporation engaged in the manufacture of architectural millwork

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to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director or any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be prohibited by this section.

and the sale of building materials. In July 1981, the company's six shareholders unanimously passed a resolution authorizing the President of Athens, John P. Bondurant, to spend $10,000 on federal election campaigns. The resolution provides that the money is to come directly from corporate assets and is to be used for contributions of no greater than $100 to candidates sympathetic to corporate interests. In addition, the shareholders authorized Bondurant to spend 50% of the allocated funds for politically oriented bill inserts, as well as for newspaper, radio, and television advertisements supporting appropriate candidates. Recognizing that the proposed expenditures and contributions would violate 2 U.S.C. § 441b(a) of the FECA, the resolution provides further that no expenditure or contribution is to be made unless § 441b(a) either is repealed or declared invalid by a court of competent jurisdiction. Accordingly, Bondurant was authorized to retain a law firm for the purpose of initiating an appropriate action on behalf of the company.[2]

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2. After recognizing that the policies of the federal government significantly impact the company, the shareholders of Athens resolved that:

> (1) The President of the Company is hereby authorized to expend a maximum of $10,000 through December 31, 1984 to support the election to national office of those persons whom he believes to be best qualified and who will best serve the people of the United States, and the interests of the Company, its employees, shareholders and customers; such candidates may include candidates for election to the United States House of Representatives, the United States Senate, and President or Vice President of the United States or member of the Electoral College to be nominated or elected at any primary, general or special election or political convention at which such candidates

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Soon after passage of the shareholders' resolution, the company filed a complaint in the United States District Court for the Middle District of Georgia for a declar-

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are to be nominated or elected held during 1981 through 1984.

(2) No contribution or other gift of money directly to a candidate or a campaign of a candidate shall exceed $100 per candidate or campaign without the prior approval of the Board of Directors.

(3) At least 50% of the fund shall be expended by the Company, independently of the campaign of any candidates for public office, on newspaper, radio, and television advertisements endorsing, promoting or opposing the election of specifically identified candidates to federal office.

(4) The President is authorized to include, at the expense of the Company, messages endorsing the positions of and urging the election of specifically identified candidates for federal office, in monthly statements regularly mailed by the Company to its customers and in letters mailed by the Company to its suppliers and persons whom the President may designate.

(5) No contributions or expenditures shall be made for political purposes, either from the special fund provided for in subparagraph 1 above, or from any other funds of the Company, until (a) 2 U.S.C. § 441b(a) is either repealed or declared invalid by a court of competent jurisdiction, and (b) the Company receives an opinion of counsel that the proposed expenditure or contribution does not violate any other valid provision of federal or state law, or any valid regulation of the Federal Election Commission or other regulatory agency.

(6) The President is hereby authorized to employ Trotter, Bondurant, Miller & Hishon to represent the Company and the President in bringing any appropriate suit on behalf of the Company under 2 U.S.C. § 437h(a), and such other statute as may be appropriate seeking a determination of the validity of 2 U.S.C., § 441b(a) by a court of competent jurisdiction.

Record, vol. I at 22-23.

atory judgment determining the constitutionality of section 441b(a). The named plaintiffs included Athens and Bondurant, both in his capacity as president of the company and his individual capacity as a qualified voter. On behalf of Athens, the complaint alleged that section 441b(a) interferes with the company's rights under the first and fifth amendments. Not only is it asserted that section 441b(a) inhibits the company's freedom to speak politically and is overbroad in its prohibition of contributions and expenditures in federal elections, but it is also alleged that the statute arbitrarily discriminates between corporations, banks, and unions on the one hand, and natural persons and other organizations on the other. By virtue of this discrimination, Athens maintains that the statute dilutes its political voice. On behalf of Bondurant, the complaint asserts that the Act impinges upon his right as a voter to receive political information from corporate sources relating to the relative qualifications of candidates for federal office.

Because the complaint raised several constitutional challenges to the FECA, appellants asked the district court to invoke the expedited procedures embodied in 2 U. S. C. § 437h and to certify the issues directly to the en banc court of appeals. The district court, however, refused to expedite the proceedings. Instead it dismissed the complaint on jurisdictional grounds, holding that neither the company nor Bondurant presented a justiciable case or controvery within the meaning of Article III of the Constitution. The court rejected Athens' claim of Article III jurisdiction because the challenged statute does not interfere with the company's business of manufacturing and selling architectural millwork and selling building materials. In

support of its position the court noted that prior to the July 1981 resolution, Athens never expressed any desire to enter the political arena. In addition, Athens was found to be seeking an advisory opinion because the company had no intention of breaking the law. Under the terms of the shareholders' resolution, no contributions or expenditures may be made so long as section 441b(a) remains in effect. With respect to Bondurant's claim, the court found no justiciable case or controversy because Bondurant remains "free to independently expend his personal funds, including dividends from the corporate plaintiff without limitation." From this dismissal, appellants filed a timely notice of appeal.

II

When Congress enacted the FECA, it was wary of the constitutional ramifications of its action. As a result, certain procedures were incorporated into the Act that were designed to facilitate prompt review by the United States Supreme Court of any constitutional challenges to the legislation. 120 Cong. Rec. 10,562 (1974) (remarks of Sen. Buckley); 120 Cong. Rec. 35,140 (1974) (remarks of Rep. Frenzel). One of these procedures for expedited review appears in section 437h and provides in part:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals

> for the circuit involved, which shall hear the matter sitting en banc.

2 U. S. C. § 437h(a). Section 437h provides further that any decision rendered by the court of appeals en banc is reviewable by direct appeal to the Supreme Court. *Id.* § 437h(b). Moreover, both the courts of appeals and the Supreme Court are directed to expedite the disposition of all issues certified pursuant to the statute. *Id.* § 437h(c).

[1, 2] In order to be eligible to invoke the expedited procedures of section 437h, a plaintiff must fall within one of the three classes of plaintiffs enumerated in the statute. *Bread Political Action Committee v. FEC*, — U. S. —, 102 S. Ct. 1235, 71 L. Ed. 2d 432 (1982). Thus, the only plaintiffs who may certify questions challenging the validity of the FECA to a court of appeals en banc are the FEC, the national committee of any political party, or an individual eligible to vote in a presidential election. *Id.*; 2 U.S.C. § 437h. As a corporation, Athens is unable to certify its constitutional challenges pursuant to the statute. Athens, however, may challenge section 441b of the FECA under the federal question jurisdiction granted federal courts in 28 U. S. C. § 1331 so long as the company satisfies the "usual" standing requirements. *Bread, supra,* 102 S. Ct. at 1240. Bondurant, on the other hand, is an individual voter, and as such is qualified to invoke expedited review under section 437h.

The Court's literal construction of section 437h(a) in *Bread* was buttressed by the clear language of the statute as well as the practical considerations involved in calling circuit judges away from their normal caseloads for expedited en banc hearings. — U. S. at —; 102 S. Ct. at 1238. Similar practicalities also prompted the requirement that

plaintiffs acting under section 437h satisfy the minimum standing requirements embodied in Article III of the Constitution. In *California Medical Association v. FEC*, 543 U. S. 182, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981), the Court rejected the view of the FEC that section 437h was subject to rampant abuse, arguing that

> "[t]he unusual procedures embodied in this section are, at the very least, circumscribed by the constitutional limitations on the jurisdiction of federal courts." 453 U. S. at 193 n. 14, 101 S. Ct. at 2719 n. 14.[3] The Court went on to conclude that one of the many Article III limitations imposed on a party acting under section 437h is the requirement of standing. *Id.* This requirement was restated again in *Bread*: "Thus, § 437h affords its unique system of expedited review to three carefully chosen classes of persons who might meet the minimum standing requirements of Article III." — U. S. at —; 102 S. Ct. at 1238; *e.g., International Association of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092, 1097-99 (D.C. Cir. 1982) (en banc) (per curiam).[4]

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3. *Accord Buckley v. Valeo*, 424 U.S. 1, 11, 96 S.Ct. 612, 630, 46 L.Ed.2d 659 (1976) (per curiam) ("At the outset we must determine whether the case before us presents a 'case or controversy' within the meaning of Article III"); *Clark v. Valeo*, 559 F.2d 642, 646 n. 2 (D.C.Cir.) (en banc), *aff'd sub nom., Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977) ("A District Judge requested to make certification under § 437h should be free to dismiss for want of jurisdiction, or to permit that question to be decided by this court en banc . . . .")

4. Notwithstanding the Court's recognition of a standing requirement, appellants urge that in enacting section 437h, Congress intended to confer standing on qualified voters thereby creating a legal right to challenge the constitutionality of the FECA. In essence, appellants maintain that Congress provided the "injury in fact" element of standing by

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Accordingly, to invoke section 437h review a party must be a proper plaintiff as defined in the statute and must have sufficient standing to satisfy the case and controversy requirement of Article III. As discussed above,

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conferring on voters the right to sue when they would be unable to sue in the absence of the statute. *See Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 1148 n. 3, 35 L.Ed.2d 536 (1973). In support of this proposition we are referred to *RITE—Research Improves the Environment, Inc. v. Costle*, 550 F.2d 1312 (5th Cir. 1981) which upheld this proposition with respect to citizens' suits pursuant to section 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365. In *RITE* the former Fifth Circuit recognized that

> [w]hile every lawsuit which receives judicial review on on the merits must fall within the scopt of Article III of the Constitution, it is a matter of black letter law that Article III does not limit congressional power to define categories of individuals as parties sufficiently aggrieved by a particular governmental action to warrant a statutory right to sue.

650 F.2d at 1320; *accord National Treasury Employees Union v. Campbell*, 654 F.2d 784, 789 (D.C.Cir. 1981); L. Tribe, *American Constitutional Law* 80 (1978). As a further example of this position appellants cite *Havens Realty Corp. v. Coleman*, — U.S. —, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) which involved Black testers who posed as home purchasers for the sole purpose of collecting evidence of unlawful racial steering practices. Despite the fact that the testers fully expected to receive false information, they were granted standing on the basis of section 804(d) of the Fair Housing Act, 42 U.S.C. § 3604(d), which "establishes an enforceable right to truthful information concerning the availability of housing . . . ." — U.S. at —; 102 S.Ct. at 1121.

Without questioning Congress' ability to create a statutory right and to confer standing on particular individuals to enforce that right, we find that section 437h is not such a statute. Section 437h does not create a cause of action for enforcing a statutory right. Instead section 437h simply confers standing on certain classes of plaintiffs to invoke the expedited procedures incorporated in the statute. *See* 120 Cong. Rec. 10562 (1974) (remarks of Sen. Buckley) ("It [§ 437h] merely provides for the expeditious review of the constitutional questions I have raised").

Athens is not a proper plaintiff and may not certify its challenges to the court of appeals en banc. Nor may the company remain in this suit as it travels to the court of appeals en banc. 678 F. 2d at 1098 (dismissing a union from a suit brought under section 437h but permitting individual voter plaintiffs to continue the suit). However, because Athens may wish to raise its challenges through normal procedures for declaratory relief, we must review the district court's ruling that the company failed to raise a justiciable claim. Bondurant, on the other hand, is a proper plaintiff under section 437h. Nevertheless, he too must satisfy the individual standing requirements necessary to support federal court jurisdiction consistent with Article III.

III

[3] For the most part, traditional standing analysis governs our evaluation of appellants' standing claims. In *Bread*, the Supreme Court indicated that "minimum standing requirements" must be satisfied by qualified plaintiffs acting under section 437h. Although *Bread* fails to explain what standing satisfies these minimum requirements, in *Valley Forge Christian College v. Americans United for Separation of Church and State*, — U. S. —, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982), the Court defined what it termed the "irreducible minimum" standing necessary to invoke the jurisdiction of a federal court. That irreducible minimum includes proof of both individualized "actual injury"[5]

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5. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979); *see Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975) ("distinct and palpable injury"); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962) ("personal stake in the outcome").

and a "fairly traceable" connection between the claimed injury and the challenged action so that a favorable verdict will redress the injury.[6] 102 S. Ct. at 758; *ALCU v. Rabun County Chamber of Commerce, Inc.*, 678 F. 2d 1379, 1384 (11th Cir. 1982).

Both Athens and Bondurant allege that threshold standing requirements are satisfied on the basis of a threat of prosecution theory. If the company were to begin its proposed program of contributions and expenditures, it would be subject to the civil and criminal sanctions embodied in the FECA. See 2 U. S. C. § 437g. Similarly, as an officer of the corporation, Bondurant would be subject to the same penalties. *See* 2 U. S. C. § 441b(a); 2 U. S. C. § 437g(d)(1)(A).[7] The company therefore asserts that its claim of standing squares directly with the standing implicitly recognized in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed. 2d 707 (1978).

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6. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976).

7. 2 U.S.C. § 437g(d)(1)(A) provides:

> Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

See also 2 U.S.C. § 437g(a)(6).

In *Bellotti*, two national banks and three business corporations sought a declaratory judgment determining the constitutionality of a Massachusetts criminal statute. The statute prohibited certain expenditures by banks and corporations for the purpose of influencing the vote on referendum proposals. Each of the corporate plaintiffs wanted to make financial contributions to publicize their views on a proposed state constitutional amendment involving the imposition of a graduated income tax. They were informed, however, that such contributions would result in prosecution under the challenged statute. 435 U.S. at 769, 98 S.Ct. at 1412. Although the Supreme Judicial Court for the State of Massachusetts upheld the statute, plaintiffs appealed the decision to the Supreme Court, arguing that the statute violated their first amendment right to engage freely in political speech. In evaluating the justiciability of the claim, the Court focused on the issue of mootness rather than standing.[8] 435 U.S. at 774-75, 98 S.Ct. at 1414-1415. Nevertheless, the anticipatory nature of the claim was acknowledged in the Court's reference to "the threat of prosecution" as opposed to any actual injury. *Id.* Thus, Athens maintains that because it is faced with the same threat of prosecution, it should have the same standing as the banks and corporate entities in *Bellotti*.

The district court rejected the analogy to *Bellotti* primarily because the Massachusetts statute imposed only criminal sanctions while the FECA imposes both criminal and civil sanctions. The court also attempted to minimize the threat of criminal prosecution by noting that appel-

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8. The issue of mootness arose because the case did not reach the court until after the tax referendum was defeated. 435 U.S. at 774, 98 S.Ct. at 1414.

lants could spend less than $2,000 of corporate funds in violation of § 441b(a), expose themselves to civil penalties and create a "real controversy." We are unpersuaded by this reasoning. Appellants should not be required to expose themselves to prosecution to secure the desired relief so long as they have "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder . . . ." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979); *accord Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 34 L.Ed.2d 201 (1973); *Let's Help Florida v. McCrary*, 621 F.2d 195, 198 (5th Cir. 1980), *cert. denied*, — U.S. —, 102 S.Ct. 999, 71 L.Ed.2d 293 (1982).

[4] The shareholder's resolution passed in July 1981 evinces Athens' intent to participate directly in the political dialogue of federal elections and section 441b(a)'s prohibition of such direct participation arguably impedes the company's first amendment right of free speech. *Bellotti, supra; see also Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed. 2d 319 (1980). There also is little doubt that a favorable declaratory judgment would allow the company to make its expenditures and contribution and afford an adequate remedy. The only difficult issue is whether a credible threat of prosecution exists so long as the resolution conditions political expenditures and contributions on repeal of the statute or a declaration of its unconstitutionality. It is uncontroverted that if Athens were to go forward with its proposal, both the company and Bondurant would

be subject to criminal and civil prosecution. Moreover, we acknowledge that the threat of criminal prosecution is very real as evidenced by the commendable zeal with which the Attorney General and the FEC approach their enforcement duties.[9] We therefore conclude that the threat of prosecution is not "imaginative or speculative" so as to render any decision by the court an advisory opinion. Indeed, as the Supreme Court recognized in *Steffel v. Thompson*, "it is not necessary that [appellant] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." 415 U.S. at 459, 94 S.Ct. at 1215 (citing *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *see also Clements v. Flashing*, — U.S. —, —, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508 (1982) ("[A]ppellees have alleged in a precise manner that, but for the sanctions of the statute they seek to challenge, they would engage in the very acts that would trigger the enforcement of the statute.").

IV

[5] Under the above analysis, both Athens and Bondurant have standing to seek a declaratory judgment under normal procedures because both are subject to the

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9. *See, e.g., FEC v. Lance*, 617 F.2d 365 (5th Cir. 1980), *on submission en banc*, 635 F.2d 1132 (5th Cir.), *cert. denied*, 453 U.S. 917, 101 S.Ct. 3151, 69 L.Ed.2d 999 (1981); *United States v. Chestnut*, 533 F.2d 40, 50, 51 n. 12 (2d Cir.), *cert. denied*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 93 (1976); *United States v. Boyle*, 482 F.2d 755 (D.C.Cir.), *cert. denied*, 414 U.S. 1076, 94 S.Ct. 593, 38 L.Ed.2d 483 (1973); *United States v. Clifford*, 409 F.Supp. 1070, 1072 (E.D. N.Y. 1976). *See generally* M. Stans, *Terrors of Justice*, 24-29 (1978).

same threat of prosecution for violations of section 441b (a). The next question is whether Bondurant has the requisite standing to expedite review on the basis of his threatened prosecution as corporate president, or whether he must rely solely upon his standing as a voter who is deprived of political information from corporations concerning federal elections. Clearly, Bondurant alleges standing in his capacity as a voter, asserting that he is denied access to all points of view in federal elections because of section 441b(a)'s prohibition on direct expenditures and contributions by corporations etc. The problem which arises when standing is asserted in such a generalized context, however, is the difficulty of demonstrating the "distinct and palpable injury" necessary to sustain a claim of individualized actual or threatened injury. *Valley Forge, supra,* 102 S.Ct. at 760 (citations omitted). But even putting aside the "distinct and palpable injury" requirement for the moment, Bondurant failed to allege how section 441b(a) denies him access to the political views of corporations. This deficiency occurs because the harshness of the prohibition on direct contributions and expenditures incorporated in section 441b(a) is alleviated somewhat by section 441b(b), which permits the use of general treasury funds for the establishment, administration, and solicitation of contributions for a segregated fund to be used for political purposes. 2 U.S.C. § 441b(b)(2)(C). Such segregated funds are administered by political action committees and can be used by corporations to make their political views known through committee contributions and expenditures. *See Pipefitters Local Union 562 v. United States,* 407 U.S. 385, 420, 431 n. 42, 92 S.Ct. 2247, 2267, 2272 n. 42, 33 L.Ed.2d 11 (1972). Indeed, an FEC release

dated July 17, 1981, evidences that 1251 public corporations, 577 trade, membership, and health organizations, 303 labor organizations, and 64 corporations without stock have formed committees for this very purpose. Brief for Appellee FEC, (Appendix). Thus, even viewing Bondurant's allegations in a most favorable light, he fails to demonstrate how the challenged statute significantly impedes corporations from making their political views known. Moreover, even if we were to assume that the flow of politically oriented corporate information would increase significantly if corporations could make direct, as opposed to indirect, contributions and expenditures, Bondurant's alleged injury is indistinguishable from that of any other voter. His claim of "voter standing," therefore, is untenable. *See Valley Forge, supra; United States v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 94 S.Ct. 2962, 41 L.Ed.2d 706 (1974); *Frothingham v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923).

The real threat of actual injury in this case is the threat of prosecution which arises out of Athens' desire to contribute and expend funds directly from the corporate treasury in lieu of a segregated fund. We therefore must determine whether an individual plaintiff can invoke the expedited procedures of section 437h by alleging standing in a capacity other than a voter. In other words, can Bondurant allege standing as a president of a corporation subject to a threat of prosecution and still claim the benefit of the expedited review afforded individual voters?

[6] The United States Court of Appeals for the District of Columbia recently addressed this issue and refused

to limit expedited review "to plaintiffs who put in issue their First Amendment rights qua voters." Instead, the court stated:

> *Martin Tractor* [*Co. v. FEC*, 460 F.Supp. 1017 (D.D.C.1978)] apart, we find no support for the Commission's position that section 437h(a) qualifies voters to raise constitutional issues only in relation to their rights as voters. Neither the language of the statute (*any* eligible voter, *all* constitutional questions) nor its legislative history suggests an interpretation so constricted. We note further that the Commission's view is difficult to reconcile with *California Medical Ass'n v. FEC*, [453 U.S. 182] 101 S.Ct. 2712 [69 L.Ed. 2d 567] (1981), in which the Supreme Court adjudicated a section 437h challenge to a provision of the Act regulating trade association activity. In short, we reject the FEC's severely limited voter standing delineation, disapprove *Martin Tractor* to the extent it adopted the Commission's view, and hold that the plaintiffs who are "individuals eligible to vote" in federal elections have statutory standing to invoke the section 437h certification procedure. *See California Medical Ass'n v. FEC*, 101 S.Ct. at 2717 n. 6 (1981); *Buckley v. Valeo*, 424 U.S. 1, 12, 96 S.Ct. 612, 631, 46 L.Ed.2d 659 (1976).

International Machinists, supra, 678 F.2d at 1098. We find this reasoning persuasive and adopt it as our own. Because we are satisfied that Bondurant has Article III standing by virtue of the threat of prosecution, and that he is an individual eligible to vote, we conclude that he is qualified to invoke the expedited procedures of section 437h.

[7] Having satisfied his individual standing requirements, we hold further that he may raise the claims of the corporate plaintiff which challenge the constitutionality of

section 441b(a). Unlike standing, which is an element of the constitutional requirement of "case or controversy," *In re Weaver*, 632 F.2d 461, 462 n. 6 (5th Cir. 1980), the general disfavor of jus tertii claims he is a prudential limitation of a non-constitutional dimension, which is designed simply "to limit access to the federal courts to those litigants best suited to assert a particular claim." *International Machinists, supra*, 678 F.2d at 1099 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979).).[10] Here, Bondurant is in as good a position as the corporate plaintiff to assert the particular challenges to the statute's constitutionality. As President of the corporation, he is subject to the same threat of criminal and civil penalties and therefore has equal incentive to litigate all of the issues raised in the complaint. Thus, we join the D.C. Circuit in recognizing that Congress has not evidenced any desire to truncate the presentation of parties entitled to expedite review. 678 F.2d at 1099. We note further that our certification of most all of the issues raised by appellant's complaint is consistent with Congress' direction that we take all steps possible to expedite review of such claims. *See* 2 U.S.C. § 437h(c).

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10. In *International Machinists* the D.C. Circuit cites a number of decisions in which individual plaintiffs were permitted to assert the rights of third parties: *Carey v. Population Services, Int'l.*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). 678 F.2d at 1099.

[8] We, however, do make one caveat to certification of the issues raised by appellants in that we do not certify the challenges made with respect to national banks and labor unions. In *FEC v. Lance*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, 453 U.S. 917, 101 S.Ct. 3151, 69 L.Ed.2d 999 (1981) (*Lance* II) the former Fifth Circuit sitting en banc evaluated that portion of section 441b making it unlawful for a national bank to make loans or to permit overdrafts in connection with an election and out of the ordinary course of business. 635 F.2d at 1141. In narrowly limiting standing, the court noted that section 441b "is a series of discrete, separable prohibitions," and that standing should be recognized only to the extent that a plaintiff has "such a personal stake" in the outcome so "as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult . . . questions." 635 F.2d at 1140 (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).). Similarly, we narrow the standing of appellant Bondurant by refusing to allow him to argue for invalidation of the entire statute.[11] Although he is in a good position to make arguments for the corporations, he lacks the ability to adequately represent the challenges of labor unions qua unions and banks qua banks. This type of prudential limitation together with the minimum standing requirements authorized in *Bread* should preclude any abuse of the expedited procedures of section 437h.

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11. The FECA contains a severability clause so that if part of the statute is invalidated by the court of appeals en banc, the remaining provisions will not be affected. 2 U.S.C. § 454.

V

Having determined that Bondurant presents a justiciable claim and is qualified to invoke certification procedures, we have two options. We either can remand the case to the district court with directions to conduct additional fact finding and certify the issues directly to the court of appeals en banc, or we can certify the issues directly. We choose the latter. *See FEC v. Lance*, 617 F.2d 365 (5th Cir. 1980) (*Lance* I).

Although certification is improper when resolution of the issues requires a fully developed factual record, *California Medical Association v. FEC*, 453 U.S. 182, 194 n. 14, 101 S.Ct. 2712, 2719 n. 14, 69 L.Ed.2d 567 (1981), we are convinced that the facts necessary to resolve the issues raised by appellants are legislative as opposed to adjudicative. As such they are as easily presented to the court of appeals en banc as to the district court. At this point, a remand to the district court would serve only to delay proceedings contrary to the Congressional mandate that we expedite certified matters "to the greatest possible extent . . . ." 2 U.S.C. § 437h(c). Submission to the en banc court, on the other hand, is consistent with the prompt review anticipated by Congress.[12]

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12. Thus far the progression of these proceedings has been far from expeditious. Appellant's original complaint was filed on July 27, 1981. On September 29, 1981, the FEC was afforded an extension of time for filing its answer. The district court's order granting defendant's motion to dismiss was not granted until February 9, 1982. Only now, after more than a full year of litigation, is the case finally sent to the court of appeals en banc for determination on the merits.

Thus, we reverse the district court's finding of non-justiciability with respect to both Athens and Bondurant. However, we direct that only Bondurant be allowed to continue the action to the court of appeals en banc. Because Bondurant satisfies both the constitutional and statutory requirements necessary to invoke expedited review, and his standing to raise the issues relating to Athens, we certify the following issues directly to the en banc Court of Appeals:

> (1) Whether 2 U.S.C. § 441b(a) violates the First Amendment to the Constitution and is, therefore, invalid in that it prohibits the plaintiffs from making any direct political contributions from corporate funds of the Athens Lumber Company, Incorpodated, directly to candidates for federal office.
>
> (2) Whether 2 U.S.C. § 441b(a) violates the First Amendment to the Constitution and is, therefore, invalid and unenforceable against plaintiffs in that it absolutely prohibits the plaintiffs from making any expenditures of corporate funds, independent of the campaign of any candidate and regardless of amount, for newspaper, radio or television advertising to advocate the election or defeat of a specifically identified candidate for federal office.
>
> (3) Whether 2 U.S.C. § 441b(a) violates the First Amendment to the Constitution and is, therefore, invalid and unenforceable against plaintiffs in that it prohibits the plaintiffs from making any expenditures of corporate funds, independent of the campaign of any candidate, to pay the cost of preparing, printing and distributing letters advocating the election or defeat of specifically identified candidates for federal office to be included as inserts in the monthly bills mailed by the corporate plaintiff to its customers, the envelopes bearing the orders or checks mailed by the corporate plaintiff to its suppliers, or in other mail-

ings made by or at the expense of the corporate plaintiff.

(4) Whether the provisions of 2 U.S.C. § 441b (a), together with the provisions of 2 U.S.C. § 431(9) (B)(i), discriminate arbitrarily and unreasonably in violation of the First and Fifth Amendments between corporations engaged in businesses other than publication of newspapers and magazines, on the one hand, and corporations engaged in the publication of newspapers and magazines, on the other, by prohibiting corporations in the former category from making any contributions or expenditures in connection with any elections to federal office, while expressly permitting corporations that publish newspapers and magazines to make 'expenditures' of corporate funds to endorse, publicize the views of, and advocate the election and defeat of specifically identified candidates for public office.

(5) Whether the provisions of 2 U.S.C. § 441b (a) discriminate arbitrarily in violation of the First and Fifth Amendments between corporations, on the one hand, and natural persons and organizations that are not corporations, on the other, by:

(A) absolutely prohibiting corporations from making a direct contribution of money directly to a candidate for federal office, or the campaign of a candidate for federal office, while permitting natural persons and organizations that are not national banks, corporations or unions, to give up to $1,000 directly to candidates for federal office or to their campaigns; and

(B) absolutely prohibiting the plaintiff corporation, and other corporations from making any expenditures of corporate funds, independent of the campaign of a candidate for federal office, in any amount, when natural persons and other organizations are permitted to spend unlimited amounts to promote the election or defeat of specifically identified candidates.

(6) Whether the provisions of 2 U. S. C. § 441b(a) prohibiting contributions or expenditures by plaintiff corporation 'in connection with' any election for federal office are unconstitutionally vague under the First and Fifth Amendments.

(7) Whether 21 U. S. C. § 441b(a) is invalid under the First Amendment because it prohibits corporations other than the Athens Lumber Company, Incorporated, and national banks and labor unions from making any expenditure of corporate funds to advocate the election or defeat of candidates for elective federal officers, thereby depriving the individual plaintiff, as a qualified voter, of his right to hear all points of view regarding the qualifications of such candidates, including the views of corporations, national banks and labor unions.

(8) Whether 2 U. S. C. § 441b(a) violates the First Amendment to the Constitution because it prohibits the expenditure of corporate funds to publish or communicate to the electorate truthful statements concerning the qualification of specifically named candidates for election to federal offices when such expenditures are made "in connection with an election," or for the purpose of influencing the outcome of such elections.

SUBMITTED TO COURT OF APPEALS EN BANC.

APPENDIX C

ATHENS LUMBER COMPANY, INC.,
et al., Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
et al., Defendants.

Civ. A. No. 81-79-ATH.

United States District Court,
M. D. Georgia,
Athens Division.

Feb. 9, 1982.

OWENS, Chief Judge:

On July 27, 1981, Athens Lumber Company, Incorporated, a Georgia corporation with its sole office and place of business in Athens, Georgia, and its president and stockholder, John P. Bondurant, as plaintiffs filed their complaint against defendants the Federal Election Commission and Attorney General William French Smith seeking a declaratory judgment finding 2 U.S.C. § 441b(a), to wit:

> "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in

> connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowing to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section."

to be constitutionally invalid under the First and Fifth Amendments to the Constitution of the United States.

The complaint alleges that this court has jurisdiction under 28 U. S. C. § 1331,[1] the federal question jurisdictional statute, and 2 U. S. C. § 437h, a provision of the Federal Elections Campaign Act, which states:

> "Judicial review—Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc
>
> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality, of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc."

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1. 28 U.S.C. § 1331 provides:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Complainants seek a declaratory judgment as specially provided for in § 437h and as generally provided for in 28 U. S. C. § 2201 which states:

> "Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

In their complaint the plaintiffs allege that Athens Lumber Company, Inc.—a manufacturer and seller of architectural millwork and seller of building materials—having been adversely affected in its business by policies, actions and laws of the United States, "desire[s] to exercise rights protected and guaranteed by the First and Fifth Amendments by assisting and promoting the election to federal offices of those persons whom the plaintiffs believe are best qualified to serve the interests of the people of the United States, and, by so doing, to promote the business and welfare of the Athens Lumber Company, Incorporated, its shareholders, customers and suppliers . . ." (Complaint, para. 7).

Plaintiffs further allege that all the plaintiff corporation's directors and shareholders—plaintiff John P. Bondurant, Mary B. Bondurant, J. P. Bondurant, III, Birdie Bondurant Clower and Emmet J. Bondurant, counsel for plaintiff—by unanimous action taken on July 23, 1981, have resolved that:

"1. The President of the Company is hereby authorized to expend a maximum of $10,000 through December 31, 1984 to support the election to national office of those persons whom he believes to be best qualified and who will best serve the people of the United States, and the interests of the Company, its employees, shareholders and customers; such candidates may include candidates for election to the United States House of Representatives, the United States Senate, and President or Vice President of the United States or member of the Electoral College to be nominated or elected at any primary, general or special election or political convention at which such candidates are to be nominated or elected held during 1981 through 1984.

"2. No contribution or other gift of money directly to a candidate or to a campaign of a candidate shall exceed $100 per candidate or campaign, without the prior approval of the Board of Directors.

"3. At least 50% of the fund shall be expended by the Company, independently of the campaign of any candidate for public office, on newspaper, radio, and television advertisements endorsing, promoting or opposing the election of specifically identified candidates to federal office.

"4. The President is authorized to include, at the expense of the Company, messages endorsing the positions of and urging the election of specifically identified candidates for federal office, in monthly statements regularly mailed by the Company to its customers and in letters mailed by the Company to its suppliers and persons whom the President may designate.

"5. No contributions or expenditures shall be made for political purposes, either from the special fund provided for in subparagraph 1 above, or from any other funds of the Company, until (a)2 U. S. C. § 441b(a) is either repealed or declared invalid by a court of competent jurisdiction, and (b) the Company

receives an opinion of counsel that the proposed expenditure or contribution does not violate any other valid provision of federal or state law, or any valid regulation of the Federal Election Commission or other regulatory agency.

"6. The President is hereby authorized to employ Trotter, Bondurant, Miller & Hishon to represent the Company and the President in bringing any appropriate suit on behalf of the Company under 2 U. S. C. § 437h(a), and such other statute as may be appropriate seeking a determination of the validity of 2 U. S. C. § 441b(a) by a court of competent jurisdiction." (Exhibit A to Complaint)

Complainants say that each form of political expression provided for by said resolution and that plaintiff corporation intends to engage in, will constitute a violation of 2 U.S.C. §441b(a). They further say that they "are afraid to exercise their rights to engage in any of the protected political activities authorized by the unanimous resolution . . . because of the threat and fear that defendants will attempt to enforce one or more of the sanctions . . . [provided for in 2 U. S. C. § 437g] against plaintiffs, thereby subjecting plaintiffs to the burden, expense and embarrassment of defending themselves and the potential risk of severe penalties in the event that the Act's restrictions are held to be valid." (Complaint, para. 13). This uncertainty, they further allege, deters them from exercising their First and Fifth Amendment constitutional rights and has caused and will continue to cause them to suffer irreparable harm. They contend that only a declaratory judgment invalidating § 441b(a) can cause this irreparable harm to cease.

Section 437g, 2 U.S.C., provides for civil enforcement by the Commission of the provision in question through

informal methods of conference, conciliation and persuasion, and authorizes the Commission to enter into a conciliation agreement. Under certain circumstances the agreement may require the payment of civil penalties. § 437g(a)(4) and (5). If the Commission is unable to enter into a conciliation agreement, it may institute a civil action in district court for injunctive relief and for imposition of a civil penalty not to exceed $5,000 or the amount of the contribution or expenditure. A showing of a knowing and wilful violation increases the possible civil penalty to the greater of $10,000 or 200% of the contribution or expenditure. § 437g(a)(6). Alternatively, the Commission, if it determines probable cause to believe a knowing and wilful violation of the Act has occurred, may refer the matter to the Attorney General. 437g(a)(5)(C).

Criminal penalties are specified in § 437g(d)(1) through (3), to wit:

> "(d)(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.
>
> "(B) In the case of a knowing and willful violation of section 316(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, or 441g of this title.

"(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

"(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alledged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

"(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the concilation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement." (emphasis added)

As the underlined words indicate, criminal penalties are not imposed on § 441b(a) prohibited contributions or expenditures aggregating less than $2,000 during a calendar year.

In responding to the plaintiffs' complaint the defendant Attorney General moved the court to dismiss the plaintiffs' complaint "on the grounds that plaintiffs' complaint fails to set forth a justiciable case and controversy between defendant William French Smith and the plaintiffs." The defendant Federal Election Commission in its responsive pleadings as a first affirmative defense stated, "This court lacks subject matter jurisdiction over this action as there is no case or controversy, and 28 U.S.C. § 1331 and 2201 do not confer jurisdiction." Pursuant to this court's local rules each party has submitted its briefs of law on these motions and they are now ready for decision.

2 U.S.C. § 437h(a)

[1] From the outset plaintiffs have urged and later moved this court to immediately certify all questions of constitutionality in this case to the Eleventh Circuit Court of Appeals for an expediated *en banc* hearing pursuant to 2 U.S.C. § 437h(a) which provides:

> "The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. *The district court immediately shall certify all questions of constitutionality of this Act* to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." (emphasis added)

In doing so the plaintiffs in effect suggest that this district court, because of the mandate of § 437h(a) is required to immediately certify the constitutional questions

as framed by the plaintiffs to the Eleventh Circuit Court of Appeals sending with its certification the entire record of this case and leaving all questions including these motions to be decided by the court of appeals. Defendants urge this court to grant their motions to dismiss and thus find that there is no case or controversy to be certified to the court of appeals under § 437h or to be considered under 28 U.S.C. § 2201, the general declaratory judgment statute.

Section 437, 2 U.S.C. and 28 U.S.C. § 2201 confer jurisdiction upon the district courts for the filing of complaints or actions for declaratory judgement. Since 2 U.S.C. § 437h provides for certification to and expedited consideration by the court of appeals sitting *en banc* and for direct appeal to the Supreme Court of the United States, and since, on the other hand 28 U.S.C. § 2201 provides for the matter to proceed at a slower pace to conclusion and judgment in the district court and for appeal to the court of appeals but not for *en banc* consideration or for direct appeal to the Supreme Court, plaintiffs naturally prefer and stress the expeditious 2 U.S.C. § 437h procedure.

The question of whether or not these plaintiffs have standing to invoke the expeditious procedure of 2 U.S.C. § 437h has been argued only by the Federal Election Commission.[2] As suggested by the Commission, the court notes that § 437h states, "The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions . . ." Since

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2. By letter dated February 10, 1982, from the Department of Justice, the court was advised that both defendants take the same position.

the plaintiff corporation is ineligible to vote and not otherwise described as a proper party, it seems to this court that § 437h's expedited procedures are not available to the plaintiff coropration. On the other hand, John P. Bondurant, corporate president, stockholder and director, is an individual eligible to vote and thus possibly a proper party to a § 437h action.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) the Supreme Court carefully and at great length considered the constitutionality of virtually every portion of the Federal Elections Campaign Act except 2 U.S.C. § 437 and its subparts, including § 437h. The Court sustained the constitutional validity of the Act's individual contribution limits, disclosure and reporting provisions and public financing scheme, but found the Act's limitations on campaign expenditures, on independent expenditures by individuals and groups and on expenditures by a candidate from his personal funds to all be constitutionally infirm. Mr. Bondurant, as an individual, is thus free to independently expend his personal funds, including dividends from the corporate plaintiff, without limitation. His only possible interest as an individual in this action must then necessarily be in using corporate funds on which corporate income taxes have been paid, but on which the additional personal income taxes due on corporate dividends have not been paid, for political expenditure purposes. Since such expenditures would be solely by the coropration, it further seems that only the corporation is the real party in interest and the only proper party to prospectively attack the prohibitions of 2 U.S.C. § 441b(a); its only available procedure since corporations are not encompassed by § 437h is the non-

expedited 28 U.S.C. § 2201 declaratory judgment provision.

In considering defendants' motions to dismiss based upon defendants' contention that the plaintiffs' complaint fails to set forth a justiciable case or controversy between the plaintiffs and the defendants, it is unnecessary to decide whether or not the expeditious § 437h declaratory judgment procedure and/or the 28 U.S.C. § 2201 declaratory judgment procedure is available to these plaintiffs since both procedures require this court to find an Article III justiciable case or controversy between the plaintiffs and the defendants for the case to be within this court's jurisdiction.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) which, as already mentioned, involved a § 437h challenge to the greater part of the Act excepting only § 441 and its subparts, the Supreme Court first considered whether or not an Article III justiciable case or controversy existed. In doing so the Court said:

> "At the outset we must determine whether the case before us presents a 'case or controversy' within the meaning of Art. III of the Constitution. Congress may not, of course, require this Court to render opinions in matters which are not 'cases or controversies.' *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241, 81 L.Ed. 617, 57 S.Ct. 461 [463-464], 108 ALR 1000 (1937). We must therefore decide whether appellants have the 'personal stake in the outcome of the controversy' necessary to meet the requirements of Art. III. *Baker v. Carr*, 369 U.S. 186, 204, 7 L.Ed.2d 663, 82 S.Ct. 691 [703] (1962). *It is clear that Congress, in enacting 2 U.S.C. § 437h* (1970 ed. Supp. IV) [2 U.S.C.S. § 437h], *intended to provide judicial review to the extent permitted by*

> *Art. III.* In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient 'personal stake' in a determination of the constitutional validity of each of the challenged provisions to present 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' *Aetna Life Ins. Co. v. Haworth, supra,* at 241, 81 L.Ed. 617, 57 S.Ct. 461 [at 464], 108 A.L.R. 1000." 424 U.S. 1 at 11, 96 S.Ct. 612 at 631, 46 L.Ed.2d 683 (1976).

and in footnote 11 answered one of the questions certified by the court of appeals as follows:

> "Does the first sentence of § 315(a) of the Federal Election Campaign Act, as amended, 2 U.S.C. § 437h(a) (1970 ed. Supp. IV), [2 U.S.C.S. § 437h(a)], in the context of this action, require courts of the United States to render advisory opinions in violation of the 'case or controversy' requirement of Article III, § 2, of the Constitution of the United States? NO."

Aetna Life Ins. Co. v. Haworth, supra, decided in 1936, discussed the "case or controversy" requirement as applied to actions for a declaratory judgment. There the Court said:

> "First.—The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' 'The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.' Per Mr. Justice Field in *Re Pacific R. Commission* (C. C.) 12 Sawy, 559, 32 F. 241, 255, citing *Chisholm v. Georgia,* 2 Dall. 431, 432, 1 L.Ed. 445, 446. See *Muskrat v. United States,* 219 U.S. 346, 356, 357, 55 L.Ed. 246, 250, 251, 31 S.Ct. 250 [253, 254]; *Old Colony Trust Co. v. Commissioner of Internal Revenue,*

279 U.S. 716, 723, 724, 73 L.Ed. 918, 925, 926, 49 S.Ct. 499 [501, 502]. The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. *Turner v. Bank of North America,* 4 Dall. 8, 10, 1 L.Ed. 718, 719; *Stevenson v. Fain,* 195 U.S. 165, 167, 49 L.Ed. 142, 143, 25 S.Ct. 1 [6, 7]; *Kline v. Burke Constr. Co.,* 260 U.S. 226, 234, 67 L.Ed. 226, 232, 43 S.Ct. 79 [82], 24 A.L.R. 1077. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution 'did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.' *Nashville, C. & St. L. R. Co. v. Wallace,* 288 U.S. 249, 264, 77 L.Ed. 730, 733, 53 S.Ct. 345 [348], 87 A.L.R. 1191. In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

"A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn v. Bank of United States,* 9 Wheat. 738, 819, 6 L.Ed. 204, 223. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical

or abstract character; from one that is academic or moot. *United States v. Alaska S. S. Co.*, 253 U.S. 113, 116, 64 L.Ed. 808, 809, 40 S.Ct. 448. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Hill Gold Min. Co. v. Amador Medean Gold Co.*, 145 U.S. 300, 301, 36 L.Ed. 712, 713, 12 S.Ct. 921; *Fairchild v. Hughes*, 258 U.S. 126, 129, 66 L.Ed. 499, 504, 42 S.Ct. 274 [275]; *Massachusetss v. Mellon*, 262 U.S. 447, 487, 488, 67 L.Ed. 1078, 1085, 43 S.Ct. 597 [601]. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. *Nashville, C. & St. L.R. Co. v. Wallace*, supra (288 U.S. p. 263, 77 L.Ed. 735, 53 S.Ct. 345 [348], 87 A.L.R. 1191; *Tutun v. United States*, 270 U.S. 568, 576, 577, 70 L.Ed. 738, 741, 742, 46 S.Ct. 425 [426]; *Fidelity Nat. Bank & T. Co. v. Swope*, 274 U.S. 123, 132, 71 L.Ed. 959, 964, 47 S.Ct. 511 [514]; *Old Colony Trust Co. v. Commissioner of Internal Revenue, supra* (279 U.S. p. 725, 78 L.Ed. 926, 49 S.Ct. 499 [502]). And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. *Nashville, C. & St. L. R. Co. v. Wallace*, supra, 288 U.S. 264, 77 L.Ed. 736, 53 S.Ct. 345 [348], 87 A.L.R. 1191."

The Court in finding the existence of a justiciable controversy considered "the nature of the controversy, the relation and interests of the parties, and the relief sought . . ." *Id.*

What is the nature of their controversy?

As defendants point out, the plaintiff family closely held corporation has resolved to expend corporate funds for purposes prohibited by 2 U.S.C. § 441b(a) but has directed that no such expenditures be made until "2 U.S.C. § 441b(a) is either repealed or declared invalid by a court of competent jurisdiction, and (b) the Company receives an opinion of counsel that the proposed expenditure or contribution does not violate any other valid provision of federal or state law, or any valid regulation of the Federal Election Commission or other regulatory agency." (Exhibit A, para. 5). Defendants say that plaintiffs have done nothing more than create a hypothetical situation with the hope that the courts of these United States will render an advisory opinion on their proposed course of conduct.

Plaintiffs citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) assert that the plaintiff corporation has standing to attack § 441b(a) because its intentions are to expend corporate funds and its exposure to civil and criminal sanctions is equal to those of *First National Bank of Boston* which the Supreme Court found adequate to give the bank standing on First Amendment grounds to challenge a Massachusetts election law prohibiting corporate speech. Unfortunately for this court the Supreme Court in *First National Bank of Boston v. Bellotti* did not discuss the question of whether or not a justicable controversy existed. On the other hand, the Court in deciding that the election that the bank desired to speak about having been held did not moot the case, did observe:

"Nor can there be any serious doubt that there is a 'reasonable expectation,' *Weinstein v. Bradford*, supra [423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350], that appellants again will be subject to the *threat of prosecution under § 8*. The 1976 election marked the fourth time in recent years that a proposed graduated income tax amendment has been submitted to the Massachusetts voters. Appellee's suggestion that the legislature may abandon its quest for a constitutional amendment is purely speculative. Appellants insist that they will continue to oppose the constitutional amendment, and *there is no reason to believe that the Attorney General will refrain from prosecuting violations of § 8*. Compare *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 546-547, 49 L.Ed.2d 683, 96 S.Ct. 2791 [2796-2797] (1976), with *Spomer v. Littleton*, 414 U.S. 514, 521, 38 L.Ed.2d 694, 94 S.Ct. 685 [689] (1974).

"Meanwhile, § 8 remains on the books as a complete prohibition of corporate expenditures related to individual tax referenda, and as a restraining influence on corporate expenditures concerning other ballot questions. *The criminal penalties of § 8 discourage challenge by violation*, and the effect of the statute on arguably protected speech will persist. *Storer v. Brown*, 415 U.S. 724, 737 n.8, 39 L.Ed.2d 714, 94 S.Ct. 1274 [1282 n.8] (1974); see *American Party of Texas v. White*, 415 U.S. 767, 770 n.1, 39 L.Ed.2d 744, 94 S.Ct. 1296 [1301 n.1] (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, 36 L.Ed.2d 1, 93 S.Ct. 1245 [1249 n.5] (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 31 L.Ed.2d 274, 92 S.Ct. 995 [998 n.2] (1972). Accordingly, we conclude that this case is not moot and proceed to address the merits." 435 U.S. at 774, 55 L.Ed.2d at 716, 98 S.Ct. at 1415. (emphasis added).

thereby intimating that the certainty of future criminal prosecution discourages constitutional challenge by violation of the statute and creates a justiciable controversy.

[2] Unlike the criminal statute that created an ongoing threat of prosecution in *First National Bank of Boston v. Bellotti*, the Act that these plaintiffs seek to attack on constitutional grounds contains both civil and criminal sanctions and, as already pointed out, its criminal sanctions for violation of § 441b(a) do not apply on corporate contributions or expenditures aggregation less than $2,000.00 during a calendar year. § 437g(d)(1) through (3). Unlike the First National Bank of Boston and its officers and directors, the Athens Lumber Company, Inc., its president, John P. Bondurant, and its officers and directors can expend less than $2,000 of corporate funds during a calendar year for the purposes prohibited by § 441b(a), expose themselves only to possible civil penalties and create a real controversy with the defendant Federal Election Commission and, assuming the Commission refers the violation to the Attorney General, also with the Attorney General. *First National Bank of Boston v. Bellotti* does not therefore require a finding of a justiciable case or controversy in this case.

What determines the existence or non-existence of a justiciable case or controversy in a case like this where plaintiffs, because of anticipated misconduct, seek to institute a First Amendment constitutional challenge? A concise summary of the law on this question is found in *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979), at 817:

> "Justiciability is a notably amorphous notion, 'a concept of uncertain meaning and scope.' *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968). It has at least two distinct components. One is jurisdictional, the Article III requirement that

federal courts decide only 'cases' and 'controversies.' The other consists of 'policy considerations,' id. at 97, 88 S.Ct. 1942 [at 1951], not specified in the Constitution but bearing on whether it is appropriate to permit a particular case to be litigated in a federal court at a particular time. See generally *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588-89, 92 S.Ct. 1716 [1719-20], 32 L.Ed.2d 317 (1972). This component is 'not always clearly distinguished from the constitutional limitation.' See *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed. 1586 (1953).

"The constitutional requirement of a case or controversy is rooted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). It is an especially crucial limit on the power of a federal court faced with an anticipatory challenge like appellants'. 'The power and duty of the judiciary is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . . *Marbury v. Madison* . . . . But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws . . . .' *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971); see *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908 [2914-15], 37 L.Ed.2d 830 (1973); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803). In other words, a plaintiff must not be allowed to enlist the aid of a federal court in a general effort to purge unconstitutional measures from the body of the law. See, e.g., *United States v. Richardson*, 418 U.S. 166, 173, 94 S.Ct. 2940 [2944], 41 L.Ed.2d 678 (1974); *Boyle v. Landry*, 401 U.S. 77, 81, 91 S.Ct. 758 [760], 27 L.Ed.2d 696 (1971). To say this is not by any means to suggest that we should be hostile to anticipatory challenges; they play a most vital role in modern efforts to enforce constitutional rights. 'It is not necessary that [a party] first expose himself to actual arrest or prosecution to be en-

titled to challenge a statute that he claims deters the exercise of his constitutional rights.' *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974). But the premise of *Marbury v. Madison* requires us to insist that an anticipatory challenge to statute's constitutionality grow out of a 'real, substantial controversy between parties . . . a dispute definite and concrete.' *Babbitt v. UFW*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979), quoting *Railway Mail Association v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483 [1487], 89 L.Ed. 2072 (1945).

"In deciding whether such a dispute exists, courts have traditionally focused on each of the parties in turn. They have asked whether the plaintiff is seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure. Some courts have held that no case or controversy exists if either of these elements is missing. See, e.g. *Rincon Bank of Mission Indians v. County of San Diego*, 495 F.2d 1, 4-6 (9th Cir.), cert. denied, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974). But we think the second aspect of this inquiry—focusing on the probability of enforcement—is relevant only to the non-jurisdictional, 'policy considerations' underlying justiciability and not to the existence of a case or controversy. There are, to be sure, several important reasons for insisting on some significant likelihood that the defendant government will enforce the statute if it is violated. A defendant uninterested in enforcing a statute is less likely to provide a vigorous defense of its constitutionality, see generally *Poe v. Ullman*, 367 U.S. 497, 501-02, 81 S.Ct. 1752 [1754-55], 6 L.Ed.2d 989 (1961) (plurality opinion); see also *Singleton v. Wulff*, 428 U.S. 106, 114 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1975); prosecutors should be permitted, and perhaps encouraged, to refuse to enforce unconstitutional laws, see e.g., *Ex parte La Prade*, 289 U.S. 444, 458-59, 53 S.Ct. 682 [685-86], 77 L.Ed. 1311 (1933); see also *Spomer v. Littleton*,

414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974); and for related educative reasons, challenges to laws that have fallen into disuse should be directed to the political branches, with the judiciary intervening only after the other branches reexamine and reaffirm such measures by resuming enforcement. But these do not appear to be jurisdictional arguments; they do not speak to the concerns of the premise derived from *Marbury v. Madison*.[6] Indeed there is clear Supreme Court authority that the probability of enforcement is not relevant to a court's jurisdiction over an anticipatory challenge. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), was an appeal of right under 28 U.S.C. § 1257(2) from a state court's dismissal of an anticipatory challenge. The statute under attack prohibited public school teachers from teaching evolution. The Court noted that '[t]here is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more a curiosity than a vital fact of life . . . .' Id. at 101-02, 89 S.Ct. at 269. Nevertheless, the Court accepted jurisdiction and—apparently believing that § 1257(2) required it to decide all appeals of which it had jurisdiction and precluded it from denying review for 'policy' reasons—reversed on the merits. The Supreme Court, like every federal court, is of course limited by Article III. Thus *Epperson* implicitly holds that the probability of a statute's being enforced, however important it is to the nonjurisdictional, 'policy' component of justiciability, is not relevant to whether an anticipatory challenge presents a case or controversy sufficient to establish federal jurisdiction.

"When we decide whether a case or controversy exists, then, we must focus on the plaintiff's interest in 'engag[ing] in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute.' *Babbitt v. UFW*, 442 U.S. 289, 303, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895 (1979). While many varieties of plaintiffs can qualify to raise anticipa-

tory claims, see e.g., *Doran v. Salem Inn*, 422 U.S. 933, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), the Supreme Court has been most willing to allow anticipatory claims by plaintiffs who allege that they wish to violate the challenged statute because of their active membership in some profession or organization that has goals apart from the extirpation of unconstitutional measures. Compare *Babbit v. UFW*, 442 U.S. 289, 300-01, 99 S.Ct. 2301, 2309-10, 60 L.Ed.2d 895 (1979); *Buckley v. Valeo*, 424 U.S. 1, 7-8, 12 & n. 10, 96 S.Ct. 612 [629, 631 & n. 10], 46 L.Ed.2d 659 (1976); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 551-53, 93 S.Ct. 2880 [2883-84], 37 L.Ed. 2d 796 (1973) (decided on merits without discussing jurisdiction); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739 [745], 35 L.Ed.2d 201 (1973); *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 506-07, 92 S.Ct. 1749 [1755], 32 L.Ed.2d 257 (1972); and *Epperson v. Arkansas*, 393 U.S. 97, 100-02, 89 S.Ct. 266 [268-69], 21 L.Ed.2d 228 (1968), with *Steffel v. Thompson*, 415 U.S. 452, 459-60, 94 S.Ct. 1209 [1215-16], 39 L.Ed. 2d 505 (1974), and *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). See *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (plaintiff's long-standing concern with issue, by itself, is insufficient to confer jurisdiction). The Court has never been explicit about this practice, but the reasons for it are clear. If we are to be faithful to the premise derived from *Marbury v. Madison*, we cannot always be satisfied by a plaintiff's formal allegation that he wishes to violate the challenged statute, for such an allegation could be honestly made by a plaintiff interested only in sweeping unconstitutional legislation from the statute books. See generally *Laird v. Tatum*, 408 U.S. 1, 13-15, 92 S.Ct. 2318 [2325-26], 33 L.Ed.2d 154 (1972). We can be most certain that a constitutional challenge grows out of a genuine dispute—and is not a contrivance prompted solely by

a desire to enforce constitutional rights—if we know that the alleged unconstitutional statute interferes with the way the plaintiff would normally conduct his affairs. Of course anticipatory challenges should be allowed in a variety of other circumstances. But usually it is sufficient, although not necessary, that the plaintiff have a role in an organization dedicated in part to activities proscribed by the challenged statute and assertedly protected by the Constitution."

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[6]The probability of enforcement seems relevant to these concerns in only one way. If there is no serious possibility that a statute will be enforced against him, a plaintiff with a genuine independent interest in acting in the way it proscribes will probably do so. A plaintiff who does not act but instead challenges its constitutionality is, therefore, more likely to be raising the constitutional claim simply because he wants to enforce his constitutional rights, not for reasons connected to any genuine concrete dispute. The premise of *Marbury v. Madison*, of course, does not permit a constitutional claim to be raised in this fashion. But any probability of enforcement, however small, may deter even a genuinely interested plaintiff. And a conscientious citizen may be unwilling to break any law that has not been repealed or invalidated, even if he believes it to be unconstitutional.

[3] Focusing on the interest of plaintiff Athens Lumber Company, Inc. and its plaintiff president in "engag[ing] in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute . . .," *Babbit v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895, 906 (1979), it is obvious that the statute under attack in no way interferes with the way that the plaintiff corporation through its plaintiff president conducts its corporate affairs—its business of manufacturing and selling architectural millwork and of selling building materials. These plaintiffs do not even allege that corporately they have a role in any organization that is dedicated in whole or in part to activities prohib-

ited by § 441b(a) and allegedly protected by the First and Fifth Amendments. Considering the absence of such possible interference in the normal affairs of this corporation, it is difficult to perceive how plaintiffs' complaint is anything more than an effort "to enlist the aid of [this] federal court in a general effort to purge unconstitutional measures from the law."

As the quoted portion of *International Society for Krishna Consciousness v. Eaves* reminds us,

> "The power and duty of the judiciary is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision. . . . *Marbury v. Madison*. . . . But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws. . . ." *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971); see *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908 [2914-15], 37 L.Ed.2d 830 (1973); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803).

There being an absence of such a concrete dispute between these plaintiffs and these defendants, the justiciable case or controversy that must exist for this court to have jurisdiction of this complaint is totally lacking, because of which defendants' motions to dismiss must be granted. To hold otherwise would put this court in the position of rendering advisory opinions in violation of Article III's "case or controversy" requirement.

Defendants' motions to dismiss are therefore GRANTED.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 82-8102

D. C. Docket No. C-81-79-ATH

ATHENS LUMBER COMPANY INCORPORATED, JOHN P. BONDURANT,

Plaintiffs-Appellants,

versus

FEDERAL ELECTION COMMISSION AND WILLIAM FRENCH SMITH, in his official capacity as Attorney General of the United States,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT and CLARK, Circuit Judges.*

JUDGMENT ON REHEARING EN BANC

Issued as mandate: Nov. 21, 1983.

This cause came on to be heard on rehearing en banc and was argued by counsel;

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*Judge Anderson is recused and did not participate in this decision.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the standing as found by the panel opinion is found by this en banc court; and that the judgment of the said District Court is hereby, REVERSED; and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

October 24, 1983

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
EN BANC

CASE NO. 82-8102

ATHENS LUMBER COMPANY, INC.
and JOHN P. BONDURANT,

Appellants,

v.

FEDEDAL ELECTION COMMISSION,
et al.,

Appellees.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

(Filed Oct. 28, 1983)

Notice is hereby given that Athens Lumber Company, Incorporated and John P. Bondurant (collectively "Appellants") hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Eleventh Circuit En Banc rendered on October 24, 1983. Appellants will seek review of that portion of the Court's judgment upholding the constitutionality of 2 U.S.C. § 441b in light of the challenge asserted by these Appellants pursuant to 2 U.S.C. § 437h.

This appeal is taken pursuant to 2 U.S.C. § 437h(b).

This 28th day of October, 1983.

/s/ Emmet J. Bondurant

/s/ Jeffrey O. Bramlett

BONDURANT, MILLER, HISHON & STEPHENSON
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Attorneys for Plaintiffs-Appellants
Athens Lumber Company, Incorporated
and John P. Bondurant

APPENDIX F

ACTION BY UNANIMOUS CONSENT OF THE SHAREHOLDERS OF ATHENS LUMBER COMPANY, INCORPORATED

The undersigned, being all of the shareholders of Athens Lumber Company, Incorporated (hereinafter referred to as the "Company"), acting pursuant to Georgia Code § 22-603(d), hereby unanimously consent to the following actions being taken and the following resolutions being adopted without a meeting, and hereby direct that this written consent be filed in the minutes of the Company:

WHEREAS, Athens Lumber Company, Incorporated, its employees, shareholders and customers are each taxpayers and beneficiaries of services provided by the Government of the United States; and

WHEREAS, much of the legislation passed by Congress has had a direct and in many instances adverse effect on the economy of the United States in general, and on the lumber and construction industries in particular, which has, in turn, had a direct and adverse effect upon the business of the Company and upon the jobs of its employees and the businesses of its suppliers and customers; and

WHEREAS, the Company is the subject of extensive, and in many cases excessive, burdensome and unnecessary regulation by the United States and various federal agencies; and

WHEREAS, the Company has a direct economic interest in the election to public office of persons who support legislation that will promote the free enterprise system, promote the economic development of the lumber and construction industries, require fiscal responsibility by the federal government, reduce and

control inflation, eliminate overregulation of business, control administrative agencies and make government agencies and employees more accountable for abuses of their official powers and positions; and

WHEREAS, the Company, its employees, shareholders and customers have a direct and substantial interest in insuring that the best qualified persons are encouraged to run for and be elected to public office; and

WHEREAS, the Board of Directors and shareholders of the Company believe that it is in the best interest of the Company, its employees, shareholders and customers for the Company to support the election of the best qualified candidates to public office in the federal government, by making contributions of $1,000 or less to those candidates for federal offices whom the management of the Company believes to be best qualified to serve the needs of the United States, the Company, its employees, shareholders and customers, and by making expenditures of funds of the Company, independent of the campaigns of any candidates, to purchase newspaper, television or radio advertisements or to pay the cost of direct mail to customers and suppliers endorsing and publicizing the positions of specifically identified candidates for federal office whose positions on matters of public policy the Company either supports or opposes, and urging the voters either to elect or defeat those candidates; and

WHEREAS, the Board of Directors and shareholders of the Company believe that Athens Lumber Company, Incorporated, is legally entitled under the First Amendment to engage in each form of political activity described above on an equal basis with natural persons and many other organizations; and

WHEREAS, the provisions of the Federal Election Campaign Act, 2 U.S.C. § 44lb(a), prohibit all corporations, including Athens Lumber Company, In-

corporated, from making any contributions or expenditures in connection with any election to federal office; and other statutes provide severe penalties for violations of § 441b(a), including so-called "civil penalties" of up to $10,000 or 200% of the amount of "the contribution or expenditure" in a suit by the Federal Election Commission (2 U.S.C. § 437g(a)(6)(C)), or a fine of $25,000 or 300% of the contribution or expenditure in a criminal prosecution brought by the Department of Justice (2 U.S.C. § 437g(d)(1)(A)), and

WHEREAS the Board of Directors and shareholders of the Company believe that it is in the best interest of the Company, its employees, shareholders and customers for the Company to exercise its rights guaranteed by the First Amendment to make contributions to candidates for elective federal offices and to make expenditures to promote the election or defeat of specifically identified candidates to those offices, but the Board of Directors is afraid for the Company to exercise such rights until the constitutionality of 2 U.S.C. §441b(a) has been determined; and

WHEREAS, the Board of Directors and shareholders desire to authorize the Company to expend money for political purposes and to authorize counsel to institute a suit on behalf of the Company in the United States District Court for that purpose,

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The President of the Company is hereby authorized to expend a maximum of $10,000 through December 31, 1984 to support the election to national office of those persons whom he believes to be best qualified and who will best serve the people of the United States, and the interests of the Company, its employees, shareholders and customers; such candidates may include candidates for election to the United States House of Representatives, the United

States Senate, and President or Vice President of the United States or member of the Electoral College to be nominated or elected at any primary, general or special election or political convention at which such candidates are to be nominated or elected held during 1981 through 1984.

2. No contribution or other gift of money directly to a candidate or to a campaign of a candidate shall exceed $100 per candidate or campaign, without the prior approval of the Board of Directors.

3. At least 50% of the fund shall be expended by the Company, independently of the campaign of any candidate for public office, on newspaper, radio, and television advertisements endorsing, promoting or opposing the election of specifically identified candidates to federal office.

4. The President is authorized to include, at the expense of the Company, messages endorsing the positions of and urging the election of specifically identified candidates for federal office, in monthly statements regularly mailed by the Company to its customers and in letters mailed by the Company to its suppliers and persons whom the President may designate.

5. No contributions or expenditures shall be made for political purposes, either from the special fund provided for in subparagraph 1 above, or from any other funds of the Company, until (a) 2 U.S.C. § 441b(a) is either repealed or declared invalid by a court of competent jurisdiction, and (b) the Company receives an opinion of counsel that the proposed expenditure or contribution does not violate any other valid provision of federal or state law, or any valid regulation of the Federal Election Commission or other regulatory agency.

6. The President is hereby authorized to employ Trotter, Bondurant, Miller & Hishon to represent the Company and the President in bringing any

appropriate suit on behalf of the Company under 2 U.S.C. § 437h(a), and such other statute as may be appropriate seeking a determination of the validity of 2 U.S.C. § 441b(a) by a court of competent jurisdiction.

IN WITNESS WHEREOF, the undersigned shareholders of the Corporation hereby affix their respective signatures, this 23rd day of July, 1981.

/s/ John P. Bondurant*

/s/ Mary B. Bondurant

/s/ J. P. Bondurant III

/s/ Birdie Bondurant Clower

/s/ Emmet J. Bondurant

*Individually and under proxy granted by Mary Bondurant Warren.